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Subject: U.S. Trademark Application Serial No. 88380382 - LIVE ON POINT - N/A - EXAMINER BRIEF

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**United States Patent and Trademark Office (USPTO)**

**U.S. Application Serial No.** 88380382

**Mark:** LIVE ON POINT

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**Applicant:** Royal Realty Corp.

**Reference/Docket No.** N/A

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**EXAMINING ATTORNEY'S APPEAL BRIEF**

Applicant has appealed the trademark examining attorney's refusal to register the trademark "LIVE ON POINT" on the ground that the applied-for mark is likely to cause confusion with the marks in U.S. Registration Nos. 5058585 and 5058586, both owned by On Point Carolinas Realty, LLC, under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

**FACTS**

On April 10, 2019, applicant, Royal Realty Corp., applied for registration on the Principal Register for the mark “**LIVE ON POINT**” for “Real estate services, namely, leasing and management of buildings” in International Class 036.

On May 22, 2019, a non-final Office action was issued where registration was refused under Trademark Act Section 2(d), 15 U.S.C. §1052(d), based on a likelihood of confusion with the marks in U.S. Registration Nos. 5058585 and 5058586 for the standard character mark “**ON POINT CAROLINAS REALTY**” and the stylized mark “**ON POINT CAROLINAS REALTY**” with design respectively. Both of these registrations identify the following services: “Real estate sales management; Real estate advertising services; Real estate marketing services” in Class 035 and “Real estate valuation services; Residential real estate agency services; Providing a database of information about residential real estate listings in different neighborhoods and communities” in Class 036.

On November 22, 2019, the applicant submitted arguments against the Section 2(d) refusal. On December 17, 2019, the trademark examining attorney issued a final Office action continuing and making final the refusal to register the mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d) due to a likelihood of confusion with the mark in U.S. Registration Nos. 5058585 and 5058586.

On June 17, 2020, applicant submitted arguments against the refusal in a Request for Reconsideration after the final Office action with time remaining for an appeal. On July 9, 2020, the trademark examining attorney denied applicant’s Request for Reconsideration. This appeal now follows the Trademark Examining Attorney’s final refusal to register applicant’s applied-for mark under Section 2(d) of the Trademark Act.

## **ARGUMENT**

The applicant's mark should be barred registration based on Trademark Act Section 2(d).

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the goods and services of the parties. *See* 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the “*du Pont* factors”). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Only those factors that are “relevant and of record” need be considered. *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 1382, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1241, 73 USPQ2d 1350, 1353 (Fed. Cir. 2004)).

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and services. *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”).

Thus, applying the above analysis, the marks should be found substantially similar in appearance, sound, connotation, and commercial impression and the services found related.

#### A. Comparison of the Marks

The applicant has applied for the standard character mark “LIVE ON POINT”, and the registrant’s marks are “ON POINT CAROLINAS REALTY” in standard character and stylized design forms.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

In this case, the applied-for mark and the registered marks share the arbitrary wording “ON POINT”. Marks may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. See *Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff’d sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1495, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMCAH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar); TMEP §1207.01(b)(ii)-(iii). Here, the marks are similar because the wording “ON POINT” appears in both the applicant’s and registrant’s marks.

Furthermore, the shared wording is distinctive and dominant in both the applicant’s and registrant’s marks. Marks must be compared in their entireties and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (“[Regarding the issue of confusion,] there is nothing improper in stating that . . . more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224

USPQ 749, 751 (Fed. Cir. 1985)). Here, the wording “ON POINT” in each of the marks should be afforded the most weight when determining the overall commercial impressions of the applicant’s and registrant’s marks.

Regarding the registrant’s marks, the wording “ON POINT” is the dominant portion of both marks because this wording is presented first in each of the marks. Consumers are generally more inclined to focus on the first words, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because “VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 USPQ2d 1698, 1700 (Fed Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because “consumers must first notice th[e] identical lead word”); *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 1303, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”). Here, consumers are likely to focus on the wording “ON POINT” in the registrant’s marks because it is the first wording in both marks. Thus, the wording “ON POINT” is the dominant portion of the registrant’s marks.

Additionally, the wording “ON POINT” is the only distinctive wording of the registrant’s marks. Although marks are compared in their entireties, one feature in a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for a party’s goods and/or services is typically less significant or less dominant when comparing marks. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*,

105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TMEP §1207.01(b)(viii), (c)(ii). In this case, the wording “CAROLINAS REALTY” is disclaimed in the registrant’s marks. Hence, the wording “ON POINT” is the dominant portion of each of the registrant’s marks because all the other wording in the marks has been disclaimed.

Additionally, regarding Reg. No. 5058586, although this mark includes a design element, the inclusion of a design would not obviate a likelihood of confusion. When evaluating a composite mark consisting of words and a design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods and/or services. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); TMEP §1207.01(c)(ii). Thus, although marks must be compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 671 F.3d at 1366-67, 101 USPQ2d at 1911 (citing *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)). Therefore, the registrant’s wording would be the dominant portion of the mark over the design elements. Additionally, the design in the registrant’s mark is noticeably smaller than the wording. This further suggests that the wording is the dominant portion of the registrants mark over the design in the mark.

Moreover, the applicant’s mark appears in standard character. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. See *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a); TMEP §1207.01(c)(iii). Thus, a mark presented in stylized characters and/or with a design element generally will not avoid likelihood of confusion with a mark in typed or

standard characters because the word portion could be presented in the same manner of display. *See*, e.g., *In re Viterra Inc.*, 671 F.3d at 1363, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that “the argument concerning a difference in type style is not viable where one party asserts rights in no particular display”). Here, since the applicant’s mark appears in standard character, the applicant’s mark may be presented in any stylization alongside any design, including the stylization and design of Reg. No. 5058586. Therefore, the design features of the registered mark do not obviate its similarity with the applied-for mark.

Regarding the applicant’s mark, although the mark includes the additional wording “LIVE” before the wording “ON POINT”, the wording “ON POINT” is the more dominant part of the mark. As noted above, although marks are compared in their entireties, certain wording of a mark may be more dominant in creating the commercial impression. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to the dominant feature when determining whether marks are confusingly similar. *See In re Detroit Athletic Co.*, 903 F.3d at 1305, 128 USPQ2d at 1050 (citing *In re Dixie Rests.*, 105 F.3d at 1407, 41 USPQ2d at 1533-34). Here, the dominant feature of the applicant’s marks are “ON POINT” for the reasons discussed *supra*.

In the present case, although the applicant’s mark contains the wording “ON POINT”, the applicant argues that the wording “LIVE” would be the dominant portion of the applicant’s mark. *See* October 13, 2020, Applicant’s Appeal Brief, TSDR p. 18-19. However, the addition of the term “LIVE” in applicant’s mark merely directs the consumer’s attention to the wording that follows, namely, “ON POINT.” The term “LIVE” may be interpreted as a command that draws attention to the wording “ON POINT” and merely expresses an intention with respect to the applicant’s real estate services. For this reason, the wording “ON POINT” is more dominant than the word “LIVE” in the applied-for mark. As such, the wording “ON POINT” remains the dominant feature of the applied-for mark in a likelihood of

confusion analysis. Therefore, the similar terms in the applicant's and registrant's marks create a similar overall commercial impression.

The applicant states that the addition of the wording "LIVE" would fundamentally alter the commercial impression of the wording "ON POINT" in their mark from the wording "ON POINT" in the registrant's marks. *See October 13, 2020, Applicant's Appeal Brief, TSDR p. 22.* However, the applicant's mark merely adds an additional word on the dominant portion of the registered marks. When comparing marks, "[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that [consumers] who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, \_\_ F.3d \_\_, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re St. Helena Hosp.*, 774 F.3d 747, 750-51, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014); *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007, 169 USPQ 39, 40 (CCPA 1971)); TMEP §1207.01(b). In the instant case, the general commercial impressions of the marks are similar because they each comprise the wording "ON POINT" as the dominant features of the marks. Specifically, the focus of the marks would be the wording "ON POINT" because the applicant's mark gives the impression of living on the point, while "ON POINT" would be the commercial impression of the registered marks because it is the only dominant portion of the registered marks. Hence, the recollection of the average purchaser for these marks would be on the wording "ON POINT".

Applicant argues that the wide spread use of the wording "ON POINT" by third parties' unregistered marks demonstrates that the wording "ON POINT" is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. *See October 13, 2020, Applicant's Appeal Brief,*

TSDR p. 11-18. However, the applicant has not provided evidence of any third-party *registered* marks which comprise the wording “ON POINT”. Here, the two registrations owned by a single registrant are insufficient to establish that the wording “ON POINT” is weak or diluted. Moreover, the applicant cites the cases *Juice Generation*, 794 F.3d 1334, 115 USPQ2d 1671 and *Primrose Ret. Cmtys.*, 122 USPQ2d 1030 as relevant decisions. See October 13, 2020, Applicant’s Appeal Brief, TSDR p. 15-18. These cases showed that evidence of several third party registrations combined with paramount evidence of third party use not on the register could cause specific wording in a mark to become diluted or weak. See *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334 (Fed. Cir. July 20, 2015) at 1339 (stating that the Board never inquired whether and to what degree the extensive evidence of third-party use *and registrations* indicates that the phrase PEACE & LOVE carries a suggestive or descriptive connotation in the food service industry, and is weak for that reason); See, e.g., *Anthony’s Pizza & Pasta Int’l, Inc.*, 95 U.S.P.Q.2d 1271, at \*8 (T.T.A.B. Nov. 10, 2009) (“The testimony, **third-party registrations**, and telephone listings are sufficient to show that the name ‘Anthony’s’ has been extensively adopted, **registered** and used as a trademark for restaurant services...”)[Emphasis added]; *Primrose Ret. Cmtys.*, 122 USPQ2d 1030 at 1036 (“We find the evidence of third-party uses **and registrations** in the present case to be “powerful on its face,” and accord this factor significant weight in the likelihood of confusion analysis”) [Emphasis added]. However, the difference between the cases referenced by the applicant and the instant application is that, in the cases referenced by the applicant, numerous third party *registrations* supported a finding that the marks were entitled to a narrower scoped of protections. Here, the record does not include evidence of third-party registrations for similar marks.

Moreover, it is notable that the overriding concern is not only to prevent buyer confusion as to the source of the services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Furthermore, a trademark registration on the Principal Register is *prima facie* evidence of the

validity of the registration and the registrant's exclusive right to use the mark in commerce in connection with the specified services. *See* 15 U.S.C. §1057(b); TMEP §1207.01(d)(iv). Hence, the registrant's ownership of their registrations entitles the registrant to the exclusive right to use the mark in commerce on or in connection with the services listed in the registrations. *See* 15 U.S.C. §§1057(b), 1115(a); TMEP §801.02(a). Here, the registrant is the sole owner of trademark registrations for marks consisting of the wording "ON POINT" for their specified services. Therefore, the registrant should be afforded the full and broadest form of protection that comes with valid registrations. *See* TMEP §801.02(a); 15 USC 1051-1072. Thus, applicant's argument that third-party usage of similar, *unregistered* marks demonstrates that the registered marks are not entitled to a broad scope of protection should not be considered because to do so would negate the presumption of the registrant's exclusive right to use the mark in commerce on or in connection with the services listed in the registration. *See* TMEP §801.02(a).

Therefore, the overall commercial impression of the marks are similar because the dominant features of the marks are identical. Thus, the marks are confusingly similar in spite of the applicant's arguments.

**B. Comparison of the Services**

The services identified in the application are: "Real estate services, namely, leasing and management of buildings." The services identified in both registrations are: "Real estate sales management; Real estate advertising services; Real estate marketing services; Real estate valuation services; Residential real estate agency services; Providing a database of information about residential real estate listings in different neighborhoods and communities." The services are compared to determine whether they are similar, commercially related, or travel in the same trade channels. *See*

*Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012).

In this case, the services are closely related. Moreover, the applicant makes no contention that these services are not related, thus effectively conceding that its services and those provided by the registrant are similar in nature, travel in the same channels of trade, and would be offered to and encountered by the same consumers. The compared services need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

In this case, both parties provide various real estate services. The Board will note the following third party evidence of record:

- Nomadic Real Estate - <https://www.nomadicrealestate.com/> - showing real estate leasing, management, valuation, databases and sales from a single location. See May 22, 2019 Office Action, TSDR p. 11-15.
- Coakley Realty - <https://www.coakleyrealty.com> – showing a wide variety of real estate service, including real estate agency, leasing, management, valuation, databases and sales from a single location. See May 22, 2019 Office Action, TSDR p. 16 -23.
- Sherman Agency - <http://theshermanagency.com> - showing real estate agency, leasing, management, valuation, databases and sales from a single location. See May 22, 2019 Office Action, TSDR p. 24 -29.

- Promark Partners - <https://www.promarkpartners.com/> - showing a wide variety of real estate service, including real estate leasing, management, databases, and sales from a single location. *See December 17, 2019 Office Action, TSDR p. 6 -9.*
- CBRE - <http://www.cbre.us> - showing a wide variety of real estate service, including real estate agency, leasing, management, valuation, databases and sales from a single location. *See December 17, 2019 Office Action, TSDR p. 10 -13.*
- EJF - <https://www.ejfrealestate.com/> - showing real estate agency, leasing, management, valuation, advertising, databases and sales from a single location. *See December 17, 2019 Office Action, TSDR p. 14 -32.*
- Associa - <https://www.associaonline.com> - showing a wide variety of real estate service, including real estate leasing, management, databases and sales from a single location. *See December 17, 2019 Office Action, TSDR p. 33 -39.*

Hence, consumers would expect the applicant's and registrant's services to emanate from a single source because the evidence demonstrates that the same entity commonly provides the relevant services and markets the services under the same mark. Thus, applicant's and registrant's services should be considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Additionally, the services of the parties have no restrictions as to nature, type, channels of trade, or classes of purchasers and are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Thus, applicant's and registrant's services are related.

## **CONCLUSION**

Any doubt regarding a likelihood of confusion determination should be resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988). In this case, the applied-for mark is confusingly similar to the registered marks and the services identified by both parties are commonly found in the same channels of trade. As such, a likelihood of confusion is evident.

For the foregoing reasons, the examining attorney respectfully requests that the refusal of registration under Section 2(d) of the Trademark Act be affirmed.

Respectfully submitted,

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